No. 22591

In the

United States Court of Appeals

For the Ninth Circuit

THOMAS FRED WALLACE and NORMA MAY WALLACE, husband and wife,
Appellants,

vs.

EMPLOYERS CASUALTY COMPANY,
Appellee.

Opening Brief for Appellee

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FACTS

For ease of reference throughout this brief, the letters Tr. will be used for the Transcript and the parties will be referred to by their designation below, that is, Thomas Fred Wallace and Norma May Wallace will be referred to as plaintiffs and Employers Casualty Company will be referred to as defendant.

The facts are brief and there is no factual issue and the parties below agreed on the facts so that the propriety of the District Court in entering summary judgment in this matter is not in question.

Plaintiffs Thomas Fred Wallace and Norma May Wallace filed an action in the Maricopa County Court, State of Arizona, being Cause No. 166356. In that action they sought damages as a result of an automobile accident occurring August 3, 1964. The accident occurred on Highway 89 in the State of Arizona in Yavapai County. This highway runs from Williams, Arizona to Phoenix, Arizona.

At the time of the accident a 1957 Chevrolet, then and there being driven by Kenneth Russell Lewis, collided with the Wallace vehicle being driven by Thomas Fred Wallace. In the State Court action, Olson Motors of Williams, Arizona was not made a party. The complaint alleged that the driver of the 1957 automobile, Kenneth Russell Lewis, was acting within the course and scope of his employment with Potts Motor Company of Phoenix, Arizona. In the State Court action judgment was rendered in favor of Mr. and Mrs. Wallace and against the various defendants in that suit. At the time of the judgment Employers Casualty Company had issued to Olson Motors of Williams, Arizona, a policy of insurance. It is plaintiffs' claim that said policy covered Kenneth Russell Lewis while he was operating the 1957 Chevrolet automobile. It is the position of defendant, Employers Casualty Company, that the policy of insurance was not applicable since the car had been sold and an executed sale had taken place. It is the defendant's position that Olson Motors no longer owned the vehicle nor did they give or have any right to give or refuse the permission to Kenneth Russell Lewis to drive the 1957 Chevrolet automobile.

Through the deposition of Mr. Robert Stokan, the manager of Olson Motors, the following facts were established: The 1957 Chevrolet had been taken in from Mr. Jack Dent on trade for a new car by Olson Motors. Thereafter it was sold to a Douglas Ezell by Olson Motors. Among the duties

of Mr. Stokan was the sale of used cars including wholesale. Mr. Stokan had been with Olson Motors since 1960 and in line of authority was directly under Mr. Olson, the owner. After the sale of the car, Kenneth Russell Lewis, acting for and on behalf of Douglas Ezell and Potts Motors, picked up the car at Olson Motors' lot in Williams, Arizona, and was driving it to Phoenix. It was while he was on his way to Phoenix with the vehicle that the accident occurred.

Stokan further testified that the 1957 Chevrolet had been sold to Douglas Ezell and that neither he nor Olson Motors had ever employed Kenneth Russell Lewis nor given him any directions as to the driving of the vehicle. Stokan further testified in his deposition that it was the intent of Olson Motors and himself that the car had been sold and Kenneth Russell Lewis was picking it up for the new owner, Douglas Ezell. He further testified that Olson Motors was paid for the car and actually received the money for it. (Pg. 36-41 of his deposition.) The payment for the car was with a sight draft and upon presentation of this sight draft, $650 in cash was paid to Olson Motors. The money was actually deposited in the account of Olson Motors and all of the bookkeeping records and entries evidencing this transaction were marked at the deposition of Mr. Stokan as exhibits.

It was established in the deposition of Mary Cross who is employed by the Arizona Highway Department, Motor Vehicle Division, as supervisor of titles and records, that on the day of the accident the certificate of registration and title had not been signed over to Douglas Ezell.

The policy in question provided as follows:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident *and arising out of the ownership, maintenance or use of any automobile.*" (Emphasis supplied)

It is the position of the defendant that under Arizona law pertaining to the sale of automobiles, ownership had been conveyed under an executed contract of sale to Douglas Ezell and therefore the policy of insurance in question did not operate to provide coverage for the automobile in question.

It is the position of the plaintiffs that the sale had not been consummated and that the driver Kenneth Russell Lewis was an omnibus insured under the policy of insurance issued by defendant to Olson Motors.

ARGUMENT

Plaintiffs have cited in their brief, several cases from other jurisdictions dealing with the law in those jurisdictions relating to the transfer of automobile titles. Too well established to even require a citation is the proposition of law that a Federal Court is obligated to follow State law with respect to matters of substantive law as opposed to procedure. This rule was, of course, established in the case of *Erie Railroad Company v. Thompkins,* 304 U.S. 64, 82 L.Ed. 1188. For this reason it is the feeling of the defendant that Arizona law controls the question before this court at this time and that this court would be obligated to follow and apply the Arizona case law with respect to this situation.

Arizona in 1927, in the Fourth Special Session of the Legislature passed what is now A.R.S. 28-314 reading as follows:

> "A. When the owner of a registered vehicle transfers or assigns his title or interest thereto, the registration of the vehicle shall expire, but the number plates assigned to the vehicle shall remain thereon. Upon the transfer or assignment, the owner shall remove the registration card issued for the vehicle and endorse upon the reverse side thereof the name and address of

> the transferee and the date of transfer, and shall immediately forward the card to the vehicle division. The owner shall also endorse on the back of the certificate of title to the vehicle, if issued, any assignment thereof, with the warranty of title in the form printed thereon, and shall deliver the certificate to the purchaser or transferee at the time of delivery to him of the motor vehicle, except as provided in § 28-323. The purchaser or transferee, except as provided in § 28-315, within ten days after the transfer shall apply for and obtain the registration of the vehicle by presenting the certificate of title thereto to the vehicle division, accompanied by the required fee, whereupon a new certificate of title shall be issued to the purchaser or transferee."

Following the adoption of this provision, at least three cases have ruled on the effect of this provision. They are *Stephens-Franklin Motors, Inc. v. Lambros,* 71 Ariz. 389, 228 P.2d 267, and *Patterson Motors, Inc. v. Cortez,* 2 Ariz. App. 298, 408 P.2d 231, and the most recent case being *Price v. Universal C.I.T. Credit Corp.,* 102 Ariz. 227, 427 P.2d 919.

In the first of these three cases, the buyer purchased an automobile paying therefor on the date of the sale. Thereafter the seller performed certain repairs and the buyer took and accepted immediate possession and delivery of the vehicle on the date of the sale. Thereafter there developed a long course of breakdowns and repairs on the vehicle. Suit was filed against the seller claiming that the buyer was entitled to receive damages by reason of the vehicle not comporting with certain representations. The defendant dealer raised an issue that the car was not sold at the time that the problems developed since the date of the sale negotiation was August 23, 1946, and the certificate of title and warranty was not mailed until September 11, 1946. The court held:

> "There is no merit to defendant's contention that this was an executory sale. In this case the sale negotiations took place August 23, 1946. The buyer on that day paid for the car and after the seller performed certain repairs, took and accepted immediate delivery. *The actual delivery of the goods is of the greatest importance in showing the intention of the parties to pass title and it is accordingly a general rule that in absence of contrary agreement, the delivery and acceptance of the property vests the title in the buyer.* 46 Am.Jur., Sales, § 433. *We therefore think it clear from the facts at hand this was an executed sale completed on August 23, 1946.*" (Emphasis supplied)

In the second of these three cases, the plaintiff, as a dealer of new and used automobiles, had delivered to another dealer three vehicles, title to which was to pass when Patterson's bank drafts were accepted and honored, Patterson being the buyer. The drafts were never paid and in the meantime the vehicles were sold to third party purchasers. The court in deciding the appeal of this case referred specifically to 28-314(a) and quoted the same. The court had before it the question of whether or not this statute had revoked the doctrine of equitable estoppel of the Uniform Sales Act. It held that it did not since the statute did not provide any penalties for non-compliance. Therefore, the court in effect held that even in the absence of complete compliance with the statute regarding re-registration of the vehicle, there may still be a completed sale. From the foregoing it is clear that the act of physical delivery of the possession of the vehicle is of great importance in Arizona. In the instant appeal, it is undisputed and in fact agreed that the physical delivery of the vehicle had taken place. In the plaintiffs' memorandum in opposition to defendant's Motion for Summary Judgment below, plaintiffs stated that

Olson Motors Company of Williams, Arizona "sold the motor vehicle to one Douglas Ezell, receiving payment and delivering possession."

The latter of these three cases is the most recent and involves a fairly complicated fact situation. Briefly, the facts are as follows:

Price advanced money to a man named Daymus for the purchase of automobiles to be sold in a used car lot operated by Daymus. As security for the advance of the money, Price held the title, endorsed in blank by the seller, to each car purchased. Daymus sold two cars to two separate people and obtained conditional sales contracts for the purchase price. These conditional sales contracts were then sold to C.I.T. for cash and the purchasers were notified to make their payments to C.I.T. The seller, Daymus, however, took the money from C.I.T. but failed to pay Price and then became bankrupt. Price sent the blank title to the Motor Vehicle Department but rather than having them issued in the name of the purchasers, had them reissued in his name. Many of the issues decided by the Supreme Court at that time are not applicable, however, the issue as to when a sale had taken place was decided as follows:

> "Appellant also argues that ownership of an automobile can be transferred only by compliance with the statutes of the State of Arizona, and can be established only through the documentary evidence prescribed thereby. He construes Pacific Finance Company v. Gherna, supra, to mean that a certificate of title must be transferred and assigned, to effect a valid sale, and that therefore the sales of the automobiles in the instant case were 'void ab initio.' "

In pointing out the fallacy of this argument, the court said:

> "The trial court found that it was the custom for automobile dealers in Phoenix to handle the paper work

> and forward title certificates to the Motor Vehicle Division for transfer. If appellant's argument is correct, then nearly all of the sales of cars in Phoenix are 'void ab initio.' "

The court then went on to quote from *Associates Discount Corp. v. Hardesty,* 74 App.D.C. 44, 122 F.2d 18, a United States Court of Appeals case for the District of Columbia, where that court construes the statutes similar to the statute in the State of Arizona, and stated:

> "The only sanction * * * is that the purchaser cannot use the automobile on the highways * * *. The statute provides only that the 'owner' shall first obtain a certificate. But it nowhere provides that he is any less the owner because he fails to do so."

Based on this reasoning, our Supreme Court in the State of Arizona then concluded:

> "We conclude, therefore, that the buyers from Daymus acquired good title * * *. Acceptance of this conclusion carries with it a determination that the buyers had the right and the ability to transfer good title to the vehicles * * *."

Applying the law of the State of Arizona with respect to sales of vehicles, it is respectfully submitted that no other finding can be made than that an executed sale had occurred at the time of the accident in question, and Olson Motors, the insured of this defendant, no longer owned the vehicle in question. Not owning the vehicle then, there could be no insurance applicable to it, since the vehicle was not either owned, maintained or used by the insured. Furthermore, not owning the vehicle, there was no right to grant permission to drive it or to deny permission to drive it, which is pointed out in cases cited later in this brief. The new owner had taken delivery of the vehicle and could use it as he saw fit.

It is not thought necessary to proceed further since defendant feels that this disposes of the matter. However, since plaintiffs have cited many cases in support of their position, defendant would comment only briefly with respect to that position.

Defendant agrees that there is authority which would support the plaintiffs' position were the lawsuit to be brought in the states from which that authority came. However, defendant only wishes to point out that each of those cases was construing a statute peculiar to that jurisdiction. There are other jurisdictions which support the position of the defendant in this case, and without being too lengthy, these cases are as follows:

Olin Mathieson Chemical Corp. v. Southwest Casualty Co., 149 F.Supp. 600. This case came from Arkansas and held that a conditional buyer does not use the vehicle with the permission of the conditional seller and so is not covered by the omnibus clause of an insurance policy even though the registration statute had not been complied with. This case contains an outstanding discussion of the law with respect to the situation at hand. The question before the court at that time was as follows:

> "Thus the primary question before the Court is whether Lester was using the truck with the permission of the named insured, Meshell, and interrelated with this issue is the subsidiary question of whether at the time of the accident Meshell was the owner of the truck with power to grant such permission."

In answering this question, the Court quoted Am.Jur. in the following respect:

> "'As is said in 5 Am.Jur., Automobiles, § 535, P. 806, "For one's use and operation of a car to be 'with the express or implied consent' of the named insured, within the meaning and effect of the omnibus clause, the rela-

> tion of the named assured to the car must be such that he or it is in a position to give consent.' See also, 45 C.J.S., Insurance, § 829, pp. 900, 901, and cases there cited."

The court entered into a fairly lengthy but enlightening consideration of the issues before it. The court recognized the conflict between the various jurisdictions as to whether compliance with the statutory provisions relating to certificate of title are necessary to convey ownership. In this respect it is stated:

> "The courts are not in agreement concerning the effect of the failure of a vendor or a vendee to comply with statutory provisions relating to certificates of title. As heretofore noted, under the Ohio law failure to comply prevents title from passing. Garlick v. McFarland, supra. Other jurisdictions so holding include Missouri, Mackie & Williams Food Stores v. Anchor Casualty Co., 8 Cir., 216 F.2d 317; and California, Harbor Ins. Co. v. Paulson, 135 Cal. App.2d 22, 286 P.2d 870. Jurisdictions holding that compliance with the registration law is not a prerequisite to passage of title include Minnesota, Johnson v. Fidelity & Casualty Co. of N. Y., 8 Cir., 238 F.2d 322; Wisconsin, Hofslund v. Metropolitan Casualty Ins. Co., 7 Cir., 188 F.2d 188; and Iowa, Federated Mutual Implement & Hardware Ins. Co. v. Rouse, D. C. Iowa, 133 F.Supp. 226."

The court went on to say:

> "The statutes are not designed to change the law with regard to passage of title upon either an absolute sale or a conditional sale of a vehicle. One court holding to the contrary has admitted that the rule that the vendor remains the owner, when the registration statute is not complied with 'may seem an artificial rule, and is contrary to that of most states * * *'. Harbor Ins. Co. v. Paulson, supra, at page 874 of 286 P.2d."

In construing the Virginia law *State Farm v. Liberty Mutual,* 238 F.Supp. 141, said that even though title did not pass because of failure to comply with a Virginia statute on titles, the seller could not prevent the buyer from driving. Consequently, there could be no right to give or deny permission under the policy of insurance and without the right to give or deny permission, there was no omnibus coverage. In *Royal Indemnity v. Shue,* 182 N.E.2d 796, an Indiana case, the court held that a conditional vendee of a motor vehicle does not use with the permission of a conditional vendor for the purposes of omnibus coverage in an insurance policy. The Indiana court in this case stated:

> "Failure to strictly comply with title conveyancing statutes does not affect transfer of ownership of a motor vehicle. The certificate of title is not of itself proof of ownership or legal title to the vehicle."

This case went on to discuss whether or not permission could be granted under the circumstances where ownership had been transferred.

> "This would be so even though Associates Investment Company had not purchased the contract, since this court has held, as a matter of law, that a conditional vendee does not use an automobile with the 'permission' of the conditional vendor within the meaning of the 'omnibus' clause in a similar policy of liability insurance. Farm Bureau Mut. Ins. Co. v. Emmons (1952), 122 Ind.App. 440, 104 N.E.2d 413. If Pratt was not operating the car with Enyeart's permission, then, certainly, Ruby Nelson was not so operating it at the time of the accident."

In *Travelers Indemnity Co. v. Nationwide Mutual Insurance Co.,* 227 F.Supp. 958, the federal court in discussing Virginia law stated that Virginia had adopted a very strict attitude in construing their motor vehicle laws. Yet the

court held the factual situation differed from the previous holdings in that Virginia had no "voiding clause" in their registration statutes as Ohio did. Arizona has no voiding clause in its statute. In discussing the type of statute Arizona has:

> "The important point is that Virginia has no such voiding statute. And while it is true that generally illegal contracts or sales are void and unenforceable, a majority of courts which, like Virginia, have only the misdemeanor penalty and no statute expressly voiding an automobile transfer for non-compliance hold that the legislators intended the mideameanor penalty imposed to be exclusive and the transaction effective even though the certificate is not transferred in compliance with the statute."

The Court of Civil Appeals of Texas in *Aetna Insurance Company v. Weatherford,* 370 S.W.2d 100 stated:

> "Although there are relatively few cases on this point, the rule appears to be well settled that a conditional vendee does not use the insured vehicle with the consent or permission of the conditional vendor, and therefore is not within the coverage of an omnibus clause of an automobile liability insurance policy as involved in this case. See 36 A.L.R.2d 673; 5A Am.Jur., Automobile Insurance, p. 94. The reason for this rule is that the automobile is no longer owned by the insured in such a sense as will, legally speaking, enable the insured to give or withhold his permission or consent to the use of the automobile by the conditional vendee, since the vendor, though retaining title to the car until fully paid for, does so for security reasons only and has no control over the car and no right to its use."

Addressing this brief for a moment to the question of the public policy of the State of Arizona, defendant would bring to the court's attention that the cases cited by the

plaintiffs in their brief of *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136, and *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 380 P.2d 145, concerned themselves with the financial responsibility laws in the State of Arizona. In those cases no issue was presented as to the sale or transfer of title of a motor vehicle. The court did not pass on this issue nor did it discuss it nor can there be found anywhere in the Financial Responsibility Law of Arizona, any provision that the seller of a vehicle shall remain responsible therefor or shall remain the owner of that vehicle until such time as he has complied with the registration-transfer provisions of the Code of Arizona. The court below in addressing itself to counsel in fact pointed out that should the legislature have desired to do so, it could have written into the Financial Responsibility Law of the State of Arizona, a provision that a previous owner would remain liable for the driving or operation of the vehicle until such time as he had complied with the title transfer statutes.

It is suggested to the court that the cases cited by plaintiffs with respect to the public policy behind the Financial Responsibility Law in Arizona deals with the attempt to compel an owner of a vehicle to insure that vehicle. As stated in A.R.S. 28-1170 B:

> "The owner's policy of liability insurance must comply with the following requirements:
> 1. It shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted.
> 2. It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle or motor vehicles within the United States or the Dominion of

Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:

(a) Ten thousand dollars because of bodily injury to or death of one person in any one accident.

(b) Subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident.

(c) Five thousand dollars because of injury to or destruction of property of others in any one accident."

Thus, under our factual situation, that responsibility fell upon Douglas Ezell since an executed contract of sale had been entered into and physical possession of the vehicle had been assumed by the agent or employee of Douglas Ezell. Since Olson Motors was no longer the owner of the vehicle and no longer had any right to use it or direct the fashion in which it would be used, Olson had no responsibility to see that it was insured. Thus, if there is any application at all of the *Schecter* case or *Mayflower* case, supra, it would apply only to Ezell, who was the owner of the vehicle at the time of the accident and who should have insured the same to protect the public.

It is clear that the interpretation placed upon the statutes of the State of Arizona by the State Courts is such that a literal compliance with the title transfer statute is not required in order to effectuate and execute the sale of a motor vehicle. Consequently, the facts that are not disputed in this present case reveal that an executed sale had occurred. When this occurred, there could no longer be liability under a policy of insurance issued by the defendant in this suit to

Olson Motors. It is therefore respectfully requested that this court affirm the judgment of the court below.

Respectfully submitted,

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears

By Ralph E. Hunsaker

Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Ralph E. Hunsaker